Filed 12/20/04 In re Jorge H. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JORGE H.-C. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. TIANA H., Defendant and Appellant.	G034140 (Super. Ct. Nos. DP008015, DP008016 & DP008017) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Gary G. Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Marsha Faith Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Lori D. Barcelona, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

Tiana H., mother of now nine-year-old Jorge H.-C., three-year-old Ricardo H.-C., and 22-month-old Francisco H.-C., appeals from an order denying her petition for modification without a hearing (Welf. & Inst. Code, § 388; all further statutory references are to the Welfare and Institutions Code) after termination of her parental rights. She contends the court abused its discretion because her petition made a prima facie showing of changed circumstances and that either return of the children to her or an additional six months of services was in the best interests of the children. We disagree and affirm.

FACTS

Orange County Social Services (SSA) took the children into custody when Francisco was born and tested positive for methamphetamine and mother tested positive for methamphetamine and marijuana; mother admitted using both drugs at least once or twice a week during the pregnancy. Mother pleaded no contest to the allegations in the petition. She was given visitation of two hours a week. Her service plan required her to, among other things, maintain regular visitation, provide a stable and safe home, refrain from using drugs and alcohol, complete a drug treatment program, including random testing, and notify SSA of any changes in residence. Although a petition was also filed against the children's father, he died before the detention hearing was held.

The children were ultimately placed with their father's ex-wife, the mother of the children's three half-sisters, with whom they had had an ongoing relationship. By the time of the six-month review hearing, mother had missed more than one-half of her weekly visits with the children, seeing them only 10 times for the period April through September. During the visits, however, she acted appropriately and lovingly.

The six-month report stated mother was homeless and unsuccessful in her attempts to enter a residential drug treatment program after a previous two-week stay at a sober living home. Mother had not participated in drug testing and had used

methamphetamine, but had attended Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) meetings on nine occasions. In addition, mother had "not reported any stable income . . . ." The addendum report noted mother had worked part-time for two weeks.

Mother did not appear at the six-month review hearing. After the court denied a request for a continuance, the parties submitted on the reports, findings, and proposed orders. The court found that although reasonable services had been provided, mother had not substantially complied with the service plan or made substantial progress toward mitigating the causes of placement. It terminated services and set a permanency hearing.

For four months, beginning the week before the six-month review hearing, SSA had no contact with mother and made several attempts to locate her. During this time mother did not visit or contact the children. In late February, mother telephoned SSA, advising that two weeks earlier she had moved into Victory Outreach Home, a rehabilitation facility in Las Vegas, which had "a year-long program," and had been sober for a month. Children were allowed and she "need[ed]" hers to live there with her. She also reported she was five months' pregnant. Additionally, she said she had attempted suicide several times during the past few months.

On the date of the permanency hearing, mother filed her petition for modification (§ 388), asking that the children be returned to her or for an additional six months of services. As to changed circumstances, she declared that she attended AA/NA meetings, and parenting, anger management, and substance abuse classes at Victory Outreach, and had learned she could not "be a good parent while continuing to use drugs . . . ." As to why this would be in the children's best interest, she stated that they "share[d] a bond that would be detrimental to . . . sever . . . . The children have already lost one parent this year and they should not have to lose another parent when the mother is sober and willing to reunify with her children who she loves very much." She declared

she was sober and could provide the children "with a stable, safe and healthy environment."

Mother did not appear at the hearing on the petition for modification. In addition to what was set out in the petition, mother's lawyer explained mother chose the Las Vegas program because it was better than local programs. She believed she needed to leave her family for awhile to "get sober in a support system with her family in Nevada, which she did not have [in Orange County]," and was not able to visit with her children for that reason. She also stated she had a job.

In denying the petition without hearing, the court stated: "There isn't a change of circumstances that justifies a hearing in this matter. [¶] There is no indication that the previous service plan has been completed. There is really no indication that [mother] has completed an approved drug program. There is no evidence, no testing, which would confirm that she is in fact drug free at this time. [¶] . . . [Mother] isn't visiting the children and isn't maintaining the relationship that she has with them. There is no evidence that there is a sufficient change in circumstances. [¶] There is, in addition, no evidence that . . . such a request would be in the children's best interest."

DISCUSSION

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the bests interests of the child. [Citation.] A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition . . . ." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) The required prima facie showing "is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.]" (*Ibid.*)

Here, the record validates denial of the petition without hearing on both grounds. While there was some showing mother had begun to address the problems that led to the children's initial detention, it was a matter of too little, too late. Mother made only minimal efforts to deal with her drug problem until after services were terminated; she used drugs during the time services were available and never participated in drug testing. Thus, as the trial court noted, there was no way of knowing if mother was drug free. And, even if she was, the period was too short to ensure that it was a permanent change. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform"].) While mother's efforts are commendable, they are not sufficient at this stage of the process and do not show changed circumstances.

Nor was there a prima facie showing that a grant of mother's petition would be in the children's best interests. While their father's death is regrettable, it is not a reason to return the children to mother, especially in light of mother's failure to comply with her service plan. Mother's visitation was spotty; she had not seen the children for over seven months when she filed the section 388 petition. She moved to Nevada without notifying the children or even calling them when she was there. Mother had never even lived with the youngest child. All this belies her claim of a bond.

By contrast, the foster mother with whom the children were living wanted to adopt the boys and they were prospering in her care. By the time of the section 388 petition, they had lived with her for over a year. They call her "[m]om." The home is stable and the children's needs are being met. Jorge, the only child old enough to voice his feelings, commented that although he loves his mother and misses her, he believes adoption was "best for him at this time."

Mother points to the court's statement that there was " no evidence that there is a sufficient change in circumstances," interpreting this as an "acknowledg[ment] that there had in fact been a change in circumstances" thereby requiring a hearing. We

do not read the comments that way. Based on the evidence, it seems plain that the court was merely elucidating the rule that circumstances that are merely "changing, rather than changed" are not sufficient. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 49.) We find no abuse of discretion in the court's denial of the petition. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

DISPOSITION

The postjudgment order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

ARONSON, J.